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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

THE PEOPLE, Plaintiff and Respondent, v. JAVON ALLEN, Defendant and Appellant.	A122890 (San Francisco County Super. Ct. No. 205349/2366410)

Defendant Javon Allen appeals the judgment and sentence imposed following his jury trial conviction for sale of cocaine base (Health & Saf. Code, § 11352, subd. (a))[1] and possession of cocaine base (§ 11350, subd. (a)). Appellant contends: (1) the trial court erred by instructing the jury with CALCRIM 359 (Corpus Delicti: Independent Evidence of a Charged Crime); (2) remand is necessary for the trial court to articulate the bases for the fines, penalties, assessments and fees imposed. We remand for the trial court to articulate the bases for the fines and penalties imposed, and affirm the judgment in all other respects.

FACTS AND PROCEDURAL BACKGROUND

On May 27, 2008, the San Francisco County District Attorney (DA) filed an information, accusing appellant in count 1 of selling cocaine base (§ 11352, subd. (a)) and in count 2 of possessing cocaine base for sale (§ 11351.5). The information also

[1] Further statutory references are to the Health and Safety Code unless otherwise noted.

alleged in connection with count 1 that appellant was subject to a limitation on probation, pursuant to Penal Code, section 1203.073, subdivision (b)(7). The information further alleged in connection with counts 1 and 2 that appellant committed the offenses while on probation, pursuant to Penal Code, section 12022.1.

Trial by jury commenced on July 30, 2008. San Francisco Police Sergeant Kevin Murray testified that on the evening of May 1, 2008, he was part of a plainclothes, narcotics investigation team conducting a "buy-bust" drug operation. In this operation, Murray and Officer Do were the arrest team, Inspector Labanowski was the "close-cover officer" who observes the drug transaction and calls in the arrest team, and Officer Gibbs was the undercover "buy officer" who engages in the drug transaction with the suspected street dealer.

Murray testified that he and Do received a description of an individual from Inspector Labanowski and were instructed to proceed to Fred's Liquors on 151 Sixth Street and arrest that individual. Murray drove about a block and a half to the Sixth Street address, where he and Do exited the vehicle and approached defendant. When Murray and Do identified themselves as police officers, defendant ran into Fred's Liquors. Murray and Do gave chase and each grabbed defendant by the arm, one on each side. As the officers were telling defendant he was under arrest, Murray saw defendant spit two objects from his mouth. When Murray collected the objects from the floor, he saw what he suspected were two small rocks of cocaine wrapped in plastic bindles. Officer Do's testimony concerning events culminating in defendant's arrest in the liquor store corroborated that of Sergeant Murray in all material respects.[2] Furthermore, Do testified that when he searched defendant he recovered "the marked city funds" (a single twenty dollar bill) inside defendant's wallet.

Inspector Labanowski testified that he prepared the marked bill for use in the "buy-bust" operation on the evening in question and gave it to Officer Gibbs. At

[2] Also, in response to a question from one of the jurors, Do confirmed that defendant matched the description he and Murray were given by Labanowski of the person involved in the transaction with Gibbs.

approximately 9:15 p.m., Labanowski observed Gibbs approach defendant in front of Fred's Liquors and then saw him "involved in a hand exchange" with defendant. Immediately thereafter, Gibbs gave Labanowski a signal that a drug deal had been completed. Labanowski then called his arrest team, gave them a description of defendant, and ordered them "to move in immediately and place the defendant under arrest."

Officer Gibbs testified that Inspector Labanowski was his "close-cover officer" in a buy-bust operation on the evening in question. After they were dropped off in the vicinity of Fifth and Sixth Streets, Gibbs noticed defendant standing in front of Fred's Liquors because he was engaging in brief interactions with "other street individuals" after which the individuals walked away towards either Market or Mission Street. Gibbs approached defendant and "asked him for a 20," a street term for $20 worth of base or crack cocaine. Defendant replied, "20"? and Gibbs said "Yeah." Defendant then put his hand to his mouth and spat out two small objects wrapped in plastic. Based on his training and experience, Gibbs believed these objects contained base cocaine.[3] Gibbs gave defendant the marked $20 bill and defendant gave Gibbs the two rocks of cocaine. Defendant said, "Put them in your mouth." Gibbs brought his hand up and pretended to put the objects in his mouth. Gibbs stated that street dealers put drugs in their mouth for concealment and to escape detection if contacted by the police. After stepping away from defendant, Gibbs gave the predetermined buy-bust signal to Inspector Labanowski.

After listening to the prosecutor's closing argument following close of evidence, the court ordered a brief recess and out of the presence of the jury announced, "[A]fter reviewing some of the –and listening to the D.A.'s argument, I am also going to give 358 and 359. The D.A. even argued that there was an admission. And the Court finds that [the] statement [by defendant] [¶] . . . [¶] . . . ordering the officer to put the rocks in his mouth to hide it or protect the officer, I find that to be an admission. So I am going to

[3] At trial, a police department criminologist testified that tests identified the drugs recovered from defendant by Gibbs and the arrest team as cocaine base weighing a little over a gram.

give CALCRIM 358 and CALCRIM 359, the corpus delicti, and I have a sua sponte duty to do that." Defense counsel did not object but said, "All right." Subsequently, the trial court read CALCRIM 358 and 359 as part of the jury instructions.

On July 31, 2008, the jury returned a guilty verdict on count one (sale of cocaine base). On count two, the jury convicted appellant of the lesser-included offense of possession of cocaine base in violation of section 11350, subdivision. (a). In a separate bench trial, appellant admitted the limitation on probation allegation brought under Penal Code, section 1203.073, subdivision (b)(7). The prosecution struck one of the on-bail allegations brought under Penal Code, section 12022.1.

At a sentencing hearing on August 29, 2008, the trial court imposed a sentence of four years in state prison and suspended execution of sentence. The court placed defendant on three years probation with one year in county jail as a condition of probation. The court also imposed fines, fees and assessments in the total amount of $1,899.50. Appellant filed a timely notice of appeal on October 6, 2008.

DISCUSSION

A. Corpus Delicti Instruction

CALCRIM 358 (Evidence of Defendant's Statements) was given as modified by the trial court as follows: "You have heard evidence that the defendant made an oral statement. You must decide whether or not the defendant made any of these statements, in whole or in part. If you decide that the defendant made such statements, consider the statements, along with all the other evidence, in reaching your verdict. It is up to you to decide how much importance to give to the statements. [¶] You must consider with caution evidence of a defendant's oral statement unless it was written or otherwise recorded."

CALCRIM 359 (Corpus Delicti: Independent Evidence of a Charged Crime) was given as modified by the trial court as follows: "The defendant may not be convicted of any crime based on his out-of-court statements alone. You may only rely on the defendant's out-of-court statements to convict him if you conclude that other evidence shows that the charged crime was committed. [¶] That other evidence may be slight and

need only be enough to support a reasonable inference that a crime was committed. [¶] The identity of the person who committed the crime and the degree of the crime may be proved by the defendant's statements alone. [¶] You may not convict the defendant unless the People have proved his guilt beyond a reasonable doubt."

Defendant asserts that the only statements attributable to him were those he made to Officer Gibbs during the course of the drug transaction, the first when he responded "20?" when Gibbs asked for "a 20" and the second when he told Gibbs to "put them in your mouth." These statements, according to defendant, "were made for the purpose of conducting the sale" and were therefore "part of the crime itself." Because these statements were part of the crime itself, defendant argues they do not support giving a corpus delicti instruction and the trial court erred in doing so, citing *People v. Carpenter* (1997) 15 Cal.4th 312, 393-394 and *People v. Chan* (2005) 128 Cal.App.4th 408, 420-421.

Defendant further contends that the trial court's alleged error in giving CALCRIM 359 was not harmless beyond a reasonable doubt. In this regard, defendant argues the instruction undercut the defense case that the officers' testimony was not sufficiently corroborated and therefore not credible. Defendant further suggests that "the jury agreed with the defense argument to some extent" because it acquitted him of possession for sale. On that basis, defendant postulates that if "given a proper legal framework for evaluating the evidence, [the jury] might have gone further and concluded that the officers' testimony about a sale having occurred was compromised by the failure to provide objective corroboration."

Defendant failed to object at trial to the court's decision to instruct the jury with CALCRIM 359. Generally, the failure to object to an instruction in the trial court forfeits any claim of error. (*People v. Andersen* (1994) 26 Cal.App.4th 1241, 1249.) However, a claimed instructional error may be reviewed despite defendant's failure to object if it "affect[s] the substantial rights of the defendant, i.e., resulted in a miscarriage of justice, making it reasonably probable the defendant would have obtained a more favorable result in the absence of error." (*Ibid.*) Accordingly, we must decide "whether the defendant's

substantial rights will be affected by the asserted instructional error." (*Ibid.*) If we conclude defendant's substantial rights will be affected by the asserted instructional error then we "may consider the merits and reverse the conviction if error indeed occurred." (*Ibid.*; see also Pen. Code, § 1259.)

In this case, we do not reach the question of whether the trial court erred in giving CALCRIM 359 because we conclude there is no reasonable probability a miscarriage of justice occurred as result. In the first place, language in CALCRIM No. 359 itself expressly cautions the jury that it cannot convict the defendant unless the People prove defendant's guilt beyond a reasonable doubt. Moreover, the court also instructed the jury with CALCRIM 220, which defines reasonable doubt, stresses that proof beyond a reasonable doubt is required for everything the People must prove, and states that in deciding whether the People have proved their case beyond a reasonable doubt the jury "must impartially compare and consider all the evidence that was received throughout the entire trial." Accordingly, we reject defendant's assertion that CALCRIM 359 permitted the jury to convict him on the basis of only "slight" evidence amounting to less than proof beyond a reasonable doubt. (See *People v. Dillon* (2009) 174 Cal.App.4th 1367, 1379 [correctness of jury instructions determined from "the entire charge of the court, not from a consideration of parts of an instruction or from [one] particular instruction."].)

Moreover, despite defendant's complaints regarding evidence that *was not* introduced at trial, the evidence that *was* introduced overwhelmingly proved beyond any reasonable doubt that defendant both sold and possessed cocaine base as found by the jury. Officer Gibbs gave defendant a marked $20 bill in exchange for two small plastic covered rocks that later tested as base cocaine. The marked $20 bill was recovered moments later in defendant's wallet after he was arrested inside Fred's Liquors by Officers Murray and Do. Officers Murray and Do both saw defendant spit small packages of suspected rock cocaine from his mouth and those too later tested as base cocaine. In sum, CALCRIM 359 did not result in a miscarriage of justice because there is no reasonable probability that defendant would have obtained a more favorable result had it not been given. (See *People v. Andersen, supra,* 26 Cal.App.4th at p. 1249.)

B. Fines and Penalties

At sentencing, the trial court imposed fines totaling $1,899.50 comprised of "the total base fine plus penalties and assessments." Defendant asserts that a sentencing court must state separately all fines, fees and penalties and specify the statutory basis for each one imposed, and that this should be reflected in the abstract of judgment, citing *People v. High* (2004) 119 Cal.App.4th 1192, 1200. Defendant contends that the trial court failed to follow this procedure and consequently remand is necessary for the trial court to specify the statutory bases for the penalties and enhancements. Respondent joins defendant in requesting remand to the trial court for this purpose. We agree remand is required on this point. (*People v. High*, *supra*, 119 Cal.App.4th at p. 1200 [record must contain a "detailed recitation of all the fees, fines and penalties" and they must be set forth in the abstract of judgment].)

DISPOSITION

The judgment of conviction is affirmed. The matter is remanded for the trial court to set forth the statutory basis and amount of each fee, fine, penalty and assessment imposed and to amend the order of probation accordingly.

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Jenkins, J.

We concur:

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Pollak, Acting P. J.

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Siggins, J.